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In The
Supreme Court of the United States

October Term, 1983

No. _____

KEVIN RIFE,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant, who was nineteen years of age; 5'-2" tall; weighed 109 pounds; had stopped growing in the 7th grade and began losing his hair due to a thyroid condition; was on thyroid medication; was a slow learner; with no previous arrest record of any kind; and did not know an attorney, was denied his right to counsel during isolated interrogation when his request to telephone his parents so they could contact an attorney for him was denied.

2. Whether the police interrogator's failure to advise the defendant, during interrogation, that he had the right to cease the questioning at any time violated defendant's rights to due process.

3. Whether the state exhibiting a video tape to the jury portraying the body of the victim at a gruesome murder scene and which did not aid the prosecution witnesses or the pathologists, in a trial where voluntariness of confessions was an issue for the jury, violated defendant's right to due process.

4. Whether defendant's confessions were legal.

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The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska filed in the above noted case on August 5, 1983.

OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of the Supreme Court of Nebraska (Appendix A) is reported at ____Neb. ____, __N.W.2d__ petition for rehearing was filed and denied without opinion on September 21, 1983.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On January 24, 1982, petitioner Kevin Rife, was employed as a bus boy at the Crown Center Restaurant in Bellevue, Nebraska. He had graduated from high school in Bellevue and, after being rejected by various branches of the military services, went to work as a bus boy. He was the product of retired military parents, and was described by his mother and police officers as a very timid, frightened individual.

On the date in question, petitioner was 5'-2" tall and weighed 109 pounds. He had stopped growing in the seventh grade and began losing his hair due to a thyroid condition. He wears thick glasses. He was on thyroid medication, was always a slow learner, and had no previous arrest record of any kind. His work record was excellent. Detective David Carlson of the Bellevue Police Department best described appellant: "He was very timid, very scared of bigger kids, and adults***. He was just a frightened individual.*** He was afraid of people" (BE:22; Ex. 1, Page 27).

Among petitioner's co-workers at the Crown Center was Edel Cook, also 19 years of age, and she lived in the same apartment complex as appellant, although not in the same building. Miss Cook and her roommate, Lori Lappin, were

co-workers of petitioner and good friends. They regarded him as one of the gang and they rode back and forth to work on occasion together. Kevin was a frequent visitor at their apartment, at least four or five times per week. They were referred to as "The Three Muskateers".

Miss Lappin described Edel Cook as athletic, 5'-10", weighing 135 pounds. She was engaged to marry George Marberger, a soldier stationed in Germany, although she dated other individuals and, on occasion, stayed overnight with them; both at her apartment and their places. Edel Cook did drink beer, whiskey, had a bottle of sloe gin in her apartment, and did smoke marijuana (she had her own bong), but the witness never saw her take pills (BE:190-197). Detective David Carlson verified that the victim, Edel Cook, while engaged to be married, did go with and have sexual relations with various individuals who were questioned in this case (BE:22, Ex. 1, Page 70, 71), including soul brothers and one Tony Caneco, a former heroin addict, who was questioned and whose lie detector tests were inconclusive (BE:22, Ex. 1, Page 20). Miss Lappin related to Detective Carlson that Miss Cook and Caneco "had been getting high on pot quite a bit just prior to January 24, 1982" and that Miss Cook stayed with Caneco over in Omaha on January 20, 1982 (BE:22, Ex. 1, Page 19, 20).

On the night of January 23, 1982, Edel Cook and Lori Lappin attended a party in Bellevue. They returned home and a girl-friend stayed overnight with them. They drank beer, ate pizza and drank some whiskey (BE:176-177). On the morning of January 24, 1982, Edel Cook went to work and Lori Lappin left the apartment at 11 o'clock A.M. to attend church

with her boyfriend.

Lori Lappin and Mark Hensley returned to the apartment at 8 o'clock P.M. that evening and, upon opening the door, discovered the body of Edel Cook on the sofa in the living room. The police were called and the investigation began.

During the early morning hours (2:30 A.M.) on January 25, 1982, petitioner was interviewed by Detective David Carlson at the police station for about 25 minutes (BE:11-12). The interview consisted of background material on the victim, the fact they worked together and petitioner's whereabouts on Sunday, January 24, 1982. Petitioner was not a suspect at the time of this interview (BE:11; 7-8).

On Wednesday, January 27, 1982, Detective Carlson and Officer Jeanette went to petitioner's parent's home and interviewed Mr. and Mrs. Carl Rife (BE:25; 1-25). The offices were checking on appellant's whereabouts on the day of the murder. They ascertained petitioner had been at his parent's home all day Sunday working on his car and, approximately, 3 o'clock P.M., his mother took him to the grocery store and then dropped him off at his apartment.

Detective Carlson learned that petitioner had a thyroid deficiency problem and how it affected him mentally and physically. He was informed of petitioner's fears, that he was timid and afraid of adults and bigger kids, and would readily take the blame for things others had done. During this half hour interview, the police officers had a complete picture of appellant through the willing cooperation of his parents (BE:28; 1-12). In fact, after the officers left, petitioner's par-

ents called them back to their home and discussed appellant's condition, and the fact that he had been ill that week and was still sick and vomiting that day (Wednesday, January 27, 1982) (BE:734; 1-17). The parents further described appellant's grief over the death of his friend, Edel Cook.

On Thursday, January 28, 1982, Officers Jeanette and Stednitz went to appellant's apartment to discuss alleged discrepancies in appellant's whereabouts on Sunday, the day of the murder. Petitioner readily admitted his error in time as to when his mother dropped him off at his apartment. Petitioner further consented to a search of his apartment and various items were seized, including clothing, hair samples, and scrapings from his door (BE:22, Ex. 3, pp. 8-9).

None of the seized items were connected to the murder and the majority were not used at the trial.

At the conclusion of this interview, Officers Jeanette and Stednitz asked petitioner to report to the police station at 1 o'clock P.M. on that date. "We'd like to take your fingerprints" (BE:780; 9-15). "We're fingerprinting people who had been in the apartment" (BE:22, Ex. 3, p. 30).

Kevin Rife indicated he was going to Miss Cook's funeral and would report to the police station immediately afterwards.

Kevin reported to the police station promptly at 1 o'clock P.M., was fingerprinted, and taken into the police "interview room".

Detective David Carlson and Captain Donald J. Carlson are graduates of the John Reid School of Criminal

Investigation[1] and their methods used in this case conform to the instruction given at the Reid School.

The Bellevue Police interrogation room measures 6 feet wide by 7 feet long, is windowless, and has a one-way mirror concealed behind a picture on the wall (BE:479; 2-25) the room is completely bare and contains a small table (3' x 4') in the corner and two straight back chairs. Detective Carlson followed his John Reid instructions in interrogation and sat very close to the subject. He maintained eye contact with the accused at all times and, prior to the interrogation, he had obtained the necessary background information on the petitioner's physical and emotional condition. He hd gained petitioner's confidence through prior interviews and, in this setting, began his twelve hour interrogation of Kevin Rife. He was well aware that Kevin was easily intimidated and was a follower, that he was afraid of bigger people and adults (BE:485; 1-25).

The record reflects that Detective David Carlson stands 6'-3" tall and weighed 190 pounds. Petitioner stood 5'-2" tall and weighed 109 pounds (BE:491; 9-12). The court has only to look at Exhibit Number 19 to determine appellant's stature.

Detective Carlson and petitioner were in the interrogation room alone and Carlson commenced the interview by discussing Edel Cook's funeral. The officer had not at anytime prior to the interrogation indicated to appellant or his parents that Kevin Rife was a suspect in a first degree murder case (BE:485; 18-25). Petitioner was not so advised when he was

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[1] *Miranda v. Arizona*, 384 U.S. 436 wherein then chief Justice Warren, in discussing John Reid's methods of interrogation, stressed that the modern practice of in-custody interrogation is psychologically, rather than physically, oriented.

fingerprinted (PE:487; 16-18).

At the outset of the interrogation, petitioner was not advised that he was a suspect in a first degree murder case. Detective Carlson merely filled out the top portion of a Rights Advisory form (BE:128; Ex. 11) and handed it to appellant to read. The officer did not even bother with the rote recitation of the Miranda warnings. He assumed appellant read the form and he then had appellant initial the questions on the bottom half of the form: "Fill it in and then just put your initials by it so that it's, you know, your hand writing" (BE:784; 1-12).

The interrogation followed the Reid prescribed form. The officer began the interrogation by confronting the appellant with: "Why are you telling all of these lies?" (BE:492; 14-25). He told petitioner the police had his boots, clothing and jacket and they had blood on them (BE:783; 1-3); an untrue fact. He told petitioner he was lying about the time he returned to his apartment from his parent's home on Sunday, and that he lied about a telephone call from his mother. These facts had been corrected with the police department on Wednesday (BE:493; 1-25). They told him they had a witness who saw him at the apartment; an untrue statement (BE:791; 8-15).

Detective Carlson never, at any time during the first interrogation session, from 1 P.M. until 3 P.M., or during any other of the subsequent sessions, advised appellant he had the right to cease the questioning if he so desired (BE:494-495).

Following prescribed procedure, the officers interrogated petitioner from 1 P.M. until 2:59 P.M. Then, a tape recording was brought into the room and a taped statement was taken

from petitioner (BE:494), which lasted twenty-five minutes. At the conclusion of the taped statement, petitioner was told to write out what he had related on the tape recording.

Again, he was not read his Miranda rights. He was not under arrest and he was not advised he was being charged with first degree murder (BE:498-499). He was handed a form to read. It took appellant an hour to write out the written statement (Ex. 52, BE:459). For the next five and one/half hours, Captain Donald Carlson and Detective David Carlson talked to appellant regarding his taped statement and his written statement (BE:501-502). Various items were removed from the confessions; the fact that drugs were involved; the fact that liquor had been consumed (BE:787, 7-25); the fact that acid pills were involved. No sexual incidents were mentioned in the first tape or the written confession (BE:504, 505) "Q. That was put in the second taped statement?; A. Yes" (BE:505; 1-3).

Petitioner was denied permission to telephone his parents:

> Q. Did they ever at anytime tell you you could call a lawyer or call your parents?
>
> A. I'd asked them one time if I could, and if I could call my parents — Well, he said, you know, 'If you want a lawyer, you can get one', and he said, 'No, We'll just have Detective Jeanette go over there—'
>
> Q. Why did you want to call your parents/
>
> A. So they can get a lawyer (BE:787-788).

Petitioner informed the police prior to the first taped confession that he wanted to telephone his parents so they

could contact an attorney. He did not know any attorneys and had never used an attorney (BE:788; 1-18).

The foregoing facts are corroborated in the record because Detective Jeanette went to petitioner's parent's home at 4:30 P.M. on the date in question. Jeanette did not recall if he advised the parents that they could talk to their son or if he was entitled to an attorney (BE:22, Ex. 3, p. 10).

Detective Carlson corroborated the foregoing when he testified petitioner would have been allowed to use the telephone to call an attorney only. He was so advised by two deputy county attorneys (BE:506, 18-19).

Petitioner's parents requested permission to see Kevin on Thursday, and officer Jeanette said no, they could not see their son. Detective Carlson said he had to check the matter with the county attorney (BE:693-694). These officers even advised appellant's parents it was not necessary for them to attend the arraignment and bond setting (BE:698-699). These officers d. request the parents obtain clothes for appellant to wear to his arraignment, but, specifically, said "don't bring them to the police station, we'll come pick them up at your house" (BE:699; 20-22). Appellant was kept completely isolated in the police station for over twenty-four hours (BE:22, Ex. 1, p. 64).

On Friday afternoon, just prior to petitioner's court appearance, he was permitted to telephone his father and, as related by his father:

> A. It sounded something like he thought 'I did it' or, 'they say I did it' or 'because' or something, I don't know (BE:702-703).

The father immediately advised his son to plead not guilty, and make them get him a lawyer. When the parents were finally permitted to see their son on the following Monday, his first words were I didn't do it.

Petitioner had no prior experience with police. When questioned on direct examination regarding his interrogation, he answered:

Q. Okay. But are those your words on that tape recording or is this something that Officer Carlson was telling you?

A. I don't know what you mean.

Q. Well, did you just go in cold and start making that tape, or did you talk with Officer Carlson?

A. He talked to me for a while.

Q. And that's for how long a period of time; do you know?

A. I can't remember.

Q. More than an hour?

A. I'm really not sure.

Q. Do you have an independent recollection of what went on in that room that day?

A. Kind of, not really.

Q. All right. Do you recall making a written statement, Kevin?

A. He told me that was formality, is what he said. He told me — Well, after I'd said I had done it and all that, he went over it with me twice and he talked to,

what was it —

Q. Did you write all that stuff out in that statement?

A. Yes, sir.

Q. Were you in the room alone when you wrote it out, or was someone with you?

A. He was standing there for a while, watching. Then he left and he'd come back in at some times.

Q. All right. And then later at night, about 9:30 or 9:50 or 10 o'clock at night, there's a second tape recording. You heard that played in the courtroom?

A. Yes, sir.

Q. Is that your voice on there?

A. Yes, sir.

Q. Were you saying those when the the thing was being recorded?

A. They were — Well, when he asked me about like I don't look like the type of person that would take drugs, to drink, to smoke pot and this and that, and I don't look like the one that would want to ruin my life and all that, and I just agreed with him.

Q. Had both Officers Carlson talked to you prior to the time you made the second tape recording?

A. Yes, sir.

Q. Did you ever at any time — did they ever at any time tell you you could call a lawyer or call your parents?

A. I'd asked them one time if I could, and if I could call my parents — Well, he said, you know, 'If you want a lawyer, you can get one.' and I said, 'Well, I don't know any. Can I call my parents and get them?' He said, 'No, we'll just have Detective Jeanette go over there —'

Q. Why did you want to call your parents?

A. So they can get a lawyer.

Q. Did you make that clear to Officer Carlson?

A. I told him, and he just said, 'Well, we're going to have Detective Jeanette go over there and talk to them.'

Q. Was this early before you gave the first tape recording that you said you wanted to call your parents?

A. Yes, sir.

Q. Did you know any lawyers in Bellevue?

A. No, sir.

Q. In Nebraska? Had you ever used a lawyer before?

A. No, sir.

Q. How long did you stay in the little room; do you remember, Kevin?

A. I'm not sure.

Q. I mean, again, do you have a good independent recollection of what went on in the room that day?

A. Somewhat.

Q. Do you remember many forms being given you, rights advisory forms?

A. Yes, sir.

Q. Did you ever make a phone call to your parents?

A. No, sir. They wouldn't allow me.

Q. Did you ever make a phone call to a lawyer?

A. No, sir.

Q. And again, you said that Officer Carlson, when he said you can call if you need a lawyer, you can call one, and you said, 'Let me call my parents so they can get one'?

A. Yes, sir.

Q. After the second tape recording, then where were you, where did they take you?

A. To jail. To the jail.

Q. Okay. Again, did you ask to make any telephone calls?

A. I asked them if I could call my parents, and they said, 'No. They probably won't know what to say to you, wouldn't want to talk to you, anyway.'

The witnesses at the trial were foundational witnesses, with the exception of Detective David Carlson who related his version of the confessions.

The taped confessions were played for the jury and the written statement was given to the jury, all over objection of the defendant.

A video tape was made of the murder scene on the date of the incident. It shows the victim's body and the blood splattered area. This video tape, over objection, was not only played for the jury in the court room, it was run a second time for the audience in the court room.

Considering all of the exhibits received in evidence, and excluding the two taped and one written confession, the only exhibits directed to petitioner were: Exhibit 61, a hair taken from a washcloth (Exhibit 34) found in Miss Cook's apartment.

The state's expert testified the hair was similar to petitioner's hair but she could not positively state it was petitioner's hair (BE:590; 1-16). She had no idea how many people in the world, or the Sarpy County area, had similar type hair (BE:599; 12-21).

Exhibit 15 was a handle to a German beer mug and expert testimony by the state indicated it contained a latent palm print that was similar to the palm print of petitioner (BE:618; 17-19). However, the record reflects the testimony of the victim's roommate, Lori Lappin, and petitioner, that he visited the apartment four or five times per week, and had discussed and handled the mug in question on various occasions.

Other than exhibits 61 and 15, which were explained, the state had no evidence linking appellant to the crime. The state needed and secured the confessions to make its case. Without the confessions, the charge could never have been filed.

The Motion to Suppress was good and should have been sustained.

The jury returned a verdict of guilty of murder in the second degree. Appellant was sentenced.

ARGUMENT

Petitioner's unlawful detention, illegal arrest, denial of right to counsel and failure to properly advise him of his rights was a denial to petitioner of due process and equal protection of the law: His subsequent alleged confessions were illegal and void.

The issue for determination is whether, considering the "totality of the circumstances" Kevin Rife was illegally detained, arrested, denied his right to counsel and denied his right to due process of law. *Clewis v. Texas,* 386 U.S. 707, set forth the guidelines followed by this Court.

1. *Illegal Detention and Arrest*

On January 24, 1982, Edel Cook was murdered in her apartment in Bellevue, Nebraska, with ferocious atrocity. Her body was found at 8 o'clock P.M. that evening by her roommate. The Bellevue Police were summoned; the investigation and the trampling on this petitioner's constitutional rights began.

The principal investigators in this case, schooled in the John Reid techniques, were Captain Don Carlson and Detective David Carlson. Petitioner was initially interviewed early on the morning (2 A.M.) of January 25, 1982. This was merely an interview to determine people who knew the deceased and because they (police) had learned petitioner was a friend, coworker, and lived in the same apartment complex as the deceased.

On Wednesday, January 27, 1982, Detective Carlson and another officer visited petitioner's parents and were fully advised of his emotional, physical and psychological condition. They were well advised petitioner had been ill all week, could not eat and was vomiting.

He presented a picture of a person 5'-2" who weighed 109 pounds. He suffered from a thyroid condition that severely affected him emotionally and psychologically. He was frightened of people and adults and was a slow learner, who, at 19 years of age, was losing his hair and wore thick glasses. He was a very timid, frightened individual who had no previous contact with the police. He was referred to as "the worm" by his contemporaries.

Armed with these facts, four police officers went to petitioner's apartment on the morning of January 28, 1982, at 9 A.M., to discuss certain matters concerning appellant's whereabouts on the date of the incident. Petitioner was not a suspect at this time. He corrected a previous statement to the police concerning the time of his return to his apartment on Sunday. He consented to a search of his apartment, items were taken by the police and, at sometime, he was advised of his rights. At the conclusion of that "interview and search", petitioner, who was still not a suspect, was directed to report to the police station, after the funeral of Miss Cook.

Petitioner attended the funeral of his friend and then reported to the police station "to be fingerprinted. We are fingerprinting all persons who had been in the apartment."

When petitioner reported to the police station, he was immediately turned over to Detective Carlson and remained

in his custody from 1 P.M. on Thursday, February 28, 1982 until he was taken to the Sarpy County jail at about 1:30 P.M. the next day (BE:507) and was arraigned and had the public defender appointed at about 3:30 P.M.

Appellant was held and detained for over 25 hours.

Nebraska Statutes 29-406, et seq., R.R.S. Neb. 1979 command the bringing of an arrested person before a magistrate when an arrest warrant has been issued. No warrant was issued in this case. The primary purpose for taking a person before a magistrate is so that a determination can be made as to whether there is probable cause to believe an offense has been committed. Section 29-506, R.R.S. Neb. 1943, *Gallegos v. State,* 152 Neb. 841, 43 N.W.2d 1.

In this case, petitioner was detained and held from 1 P.M. on January 27, 1982 until 3 P.M. on January 28, 1982; and the only reasonable explanation for the delay in taking the appellant before a magistrate was: "A. (David Carlson) Because we felt we wanted to talk to him some more" (BE:22, Ex. 1, p. 57).

It is apparent from all of the evidence here that the only reason in detaining petitioner and not taking him before a magistrate was so that the police could further their efforts in attempting to obtain probable cause.

No complaint could have been filed, no warrant could have been issued, or probable cause shown, at the time appellant reported to the police station. *The police had to detain appellant for over 25 hours, isolate him from an attorney and his family* and, through techniques and methods diametrically opposed to our constitutional sense of justice, extract from

him the grounds necessary to obtain what our system of law first requires before a person can be detained.

This court held, in applying the requirement of taking a person before a magistrate, that delays simply to elicit admissions to support the arrest, and ultimately the guilt, cannot be upheld. *Mallory v. U.S.*, 354 U.S. 499.

In this case, it is undisputed, and uncontradicted and Detective Carlson testified he had extracted 1) an oral admission of guilt from petitioner prior to 2:59 P.M.; then he taped a confession 2) commencing at 2:59 P.M. and lasting until 3:39 P.M.; he then had petitioner write out a statement commencing at 4:34 P.M.; 3) finally, after further interrogation, changing, deleting, and adding matters, he again taped a confession 4) commencing at 9:50 P.M. Petitioner appeared before a magistrate the following day at 3:30 P.M. (BE:Ex. 1, p. 65). During that period of time, he had talked *only* to the police, Carlson brothers, had not been permitted to make a telephone call and was isolated (BE:22, Ex. 1, p. 64, Lines 22-25) with only police officers around him.

Petitioner was illegally detained and the record is unclear as to when he was arrested, but it appears to be approximately 8 P.M. on February 28, 1982 (BE:22, Ex. 1, p. 56).

2. *Denial of the Right to Counsel*

One principal of law is now clear. In *Miranda v. Arizona*, 384 U.S. 436, this court ruled the accused must be appraised of his constitutional right against self-incrimination and his right to counsel before custodial interrogation can be conducted by the police. The Court has also established the procedure to be followed subsequent to the warnings; *if the*

accused indicates he desires to remain silent, or if he requests an attorney, the interrogation must cease.

The standards were further established that once in custody a person's rights to cut off questioning must be scrupulously honored by the police. *Michigan v. Mosley,* 423 U.S. 96. Furthermore, if there is a waiver of rights, that waiver must be freely, voluntarily and knowingly made. 384 U.S. 436.

The *Miranda* Court spoke of "custodial interrogation" and that Court reconsidered the meaning of this phrase in *Rhode Island v. Innis,* 466 U.S. 291 (1980).

In *Innis,* the defendant had been advised of his constitutional right against self-incrimination upon arrest and had requested an attorney. While enroute to the station, the two arresting officers discussed a missing shotgun, which allegedly had been used in the commission of the crime. One of the officers stated that there were "a lot of handicapped children in this area," and "God forbid one of them might find a weapon with shells and *** hurt themselves." Innis then told the offices he would show them where the gun was located. Upon returning to the scene of the arrest, Innis was again informed of his right to remain silent. He replied that he understood his rights, but "wanted to get the gun out of the way because of the kids in the area of the school." Id. at 295.

The Court in *Innis* clarified *Miranda's* definition of custodial interrogation, holding that the *Miranda* protections against self-incrimination are applicable whenever a person in custody is subjected to either express questioning or its "functional equivalent." 466 U.S. 300-01. The functional equivalent of express questioning refers to police words or

actions (excluding those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

This more comprehensive definition of custodial interrogation serves to counter the numerous police "techniques" which do not involve express questioning of the defendant. *Hence, when a police practice is designed to elicit an incriminating response from a person, it is most likely one which the police should know is reasonably likely to have that effect.*

The Court's interpretation of custodial interrogation, however, does not hold police accountable for the unforeseeable results of their words or actions. This limitation is significant because it allows the police to expose a person to "subtle compulsion" without violating the fifth amendment protection against self-incrimination. To suppress a confession made during interrogation, *it is necessary to establish that a suspect's incriminating response was the product of the subtle compulsion that the officers should have known was reasonably likely to elicit an incriminating response.*

The Court requires an objective inquiry into the likely effect of police conduct on a *typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know.*

The Court conceded that Innis was exposed to *subtle compulsion*, but held that fact is not controlling in the absence of evidence establishing that the officers should have known their words would likely elicit an incriminating response from the defendant. *The Court reviewed the record and found no evidence that the officers were aware of Innis' susceptibility to*

an appeal to his conscience concerning the safety of handicapped children. Similarly, there was no indication that the officers knew Innis was unusually disoriented or upset at the time of his arrest. Thus, the Court concluded that the officers' dialogue regarding the shotgun within the hearing of Innis was merely an expression of their own concern and not intended to be interrogation (Emphasis supplied) c.f. *Creighton Law Review,* Vol. 15, p. 213, *Criminal Law:* the Miranda Decision and its Progeny.

The police here were well aware of petitioner's condition, they had investigated it prior to their custodial interrogation, yet, in view of all of those factors, Detective Carlson did not bother to read the Rights Advisory form to appellant. He felt appellant understood it because his eyes traveled over the paper.

Once Detective Carlson had petitioner in their 6 feet by 7 feet windowless, bare, interrogation room, he commenced asking petitioner why are you telling me all these lies, we have your boots, jacket and clothing and they have blood on them, we have a witness, we know what happened. All of the foregoing was untrue but was a "Reid technique" to exert subtle compulsion on the will of appellant. c.f. *United States v. Alexander,* 428 A. 2d 42, 51 (D.C. 1981) (during cross-examination the interrogating officer admitted that his statement to the accused "we know what happened," was a technique utilized to try to coerce the accused to talk and was thus held to be inadmissible).

From the outset, this petitioner was not advised he was a suspect in a first degree murder case. Carlson assumed he read the form which indicated a homicide investigation.

Q. But did he understand when he filled this thing out at about 1 o'clock on that afternoon that he was a suspect in connection with this homicide? Did you ever use those words?

A. (Carlson) *No,* I don't believe I used those words (BE:22, Ex. 1, p. 31).

If the petitioner did not understand he was a suspect in a homicide how could he voluntarily, knowingly waive his rights to counsel?

Q. Okay, at that point when he indicated to you he killed her and he started to shake and was upset did you at that time say, 'Well, Kevin, you've given a confession, or you confessed to a murder, you have the right to an attorney?

A. (Carlson) No.

Q. Did you go over the Rights Advisory form again with him?

A. (Carlson) No, I did not.

Q. Or tell him he could call his parents?

A. No (BE:22, Ex. 1, p. 38).

Detective Carlson had conferred with the county attorney during the interrogation and "***on him making any calls, and that was only to an attorney he could make a phone call to after he was arrested. This was later in the afternoon" (BE:22, Ex. 1, p. 39).

It would appear the officer was under the mistaken impression petitioner could only call an attorney after he had

been arrested, and later in the afternoon.

Petitioner's testimony, unrebutted, was that he did not know an attorney. "Can I call my parents and get them, and he said no". He did not know a lawyer, had no prior contact with police, and always relied upon his parents. Yet, he was not permitted to call them so they could call an attorney for him.

The burden of proving a voluntary, knowingly and valid waiver of counsel is still on the state. *Rice v. Olson*, 324 U.S. 786; *Dougherty v. Maxwell*, 376 U.S. 202; *McLeod v. Ohio*, 378 U.S. 582. That burden here was never met by the state.

This Court in Miranda, states that no amount of circumstantial evidence that a person *may have been aware of his rights* will suffice.

This Court, in *Clewis v. Texas*, 386 U.S. 707, in discussing the "totality of the circumstances" stated among the factors which require a conclusion that the "confession" was not voluntary are:

a) During the long period of custody, petitioner was never fully advised that he could consult counsel and have counsel appointed if necessary; and that anything he said could be used against him, *and that he fully understood these rights.*

b) The first statement was secured following an initial taking into custody which was not supported by probable cause, followed by 38 hours of intermittent interrogation.

c) The record inspires substantial concern as to the extent to which *petitioner's faculties* were impaired by *inadequate sleep, food, sickness* and *long subjection to police custody,*

with little or no contact with anyone other than police (Emphasis supplied).

3. *Illegal Confessions*

The police in this case readily admit they knew all about petitioner when they placed him in their small interrogation room. They had his background and Detective Carlson, who was twice the size of petitioner readily admitted petitioner was a frightened individual. Carlson had him in the room alone; sat real close to him; facing him; and (approximately 2 feet away) accused him of lying. Maintained constant eye contact.

Detective Carlson used the methods taught by John Reid in connection with interrogation (BE:479). He knew petitioner was easily intimidated and a follower (BE:485, 18-21). Straight-back chairs were used so the suspect could not lean back or be distracted. The interviews were not taped until Carlson got his desired results (BE:491; 22-23). Petitioner was never advised he was a suspect, never told him he could cease the interrogation anytime he desired (BE:495; 1-4).

Carlson agreed one method of interrogation is to gain the confidence of the accused, and sit with your knees between his, although he stated he was one or two feet away from appellant. Petitioner said Carlson had his knees between his and Carlson admitted he comforted petitioner.

Given the fact that the room was only 6′ x 7′ and Carlson was 6′-3″ and 190 pounds as opposed to appellant's 5′-2″ and 109 pounds, and a table in the room was 3′ x 4′, there was very little room left to move around.

Petitioner was never advised he was under arrest or that he was confessing to a crime for which he could get the death penalty until 10 P.M. at night, 10 hours after the interrogation began (BE:499; 11-25).

This Court has long held the principal of law that statements which are not the product of a free will or a rational intellect are involuntary. Involuntary statements must be excluded. *Townsend v. Saine,* 372 U.S. 293.

Not only is such a statement inadmissible, but all other evidence obtained, either as a direct or indirect consequence of it is inadmissible. The time has come to again impress these principles of law on law enforcement authorities of the state.

The John Reid methods were deplored in Miranda:

> From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: to be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning are employed to obtain a confession the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired object may be obtained'. When normal procedures fail***the police resort to deceptive stratagems***. It is important to keep the subject off balance, by *trading on his insecurity about himself* or his surroundings.

> Even without employing brutality, the third degree or the specific strategems described, the very fact of custodial interrogation exacts a heavy toll on individual liberties and trades on the weaknesses of individuals. (Emphasis supplied) 309 U.S. 227.

In the present case, Detective Carlson achieved his desired results without the efficiency of the rack or thumbscrew. He isolated and held petitioner incommunicado for 25 hours, traded on his weaknesses, applied his "Reid technique" and claimed victory!

4. *Credibility and Reliability of the Confessions*

The issue for determination is whether, considering the 'totality of the circumstances' petitioner's four distinct statements or confessions are credible and reliable. This can best be illustrated by showing that in the oral admission there was no reference to touching the victim sexually in any manner. This was added after further interrogation. In the oral admission, drugs and acid were mentioned and included in the first taped statement because the officers did not believe petitioner was that kind of person.

It took officers Carlson 6 hours to move the sexual incident into the last statement and completely removed any reference to acid, pills or liquor from the final statement.

A complete reading of all four statements will indicate to this Court that they are not credible or trustworthy. From the first oral admission to the last taped statement we lose a marijuana bong, consumption of alcohol, freaking out, consumption of acid pills and have a statement showing an alleged murder, with premeditation and malice, and completion with

an alleged sexual touching out of curiosity.

In *Greenwald v. Wisconsin*, 390 U.S. 519, 20 L. Ed. 2d 77, 88 S. Ct. 1152, in a separate opinion by Mr. Justice Stewart, he pointed out that the state his the burden of proving "beyond a reasonable doubt" that appellant's decision to confess was the product of his own unfettered will; and, in the present case, we submit, from a totality of the circumstances, the state wholly failed in its burden to prove beyond a reasonable doubt that petitioner alleged statements were the product of his free unfettered will.

II.

The state's use of gruesome, inflammatory and prejudicial photographs and video tapes inflamed and prejudiced the jury and denied appellant his right to a fair trial.

The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.

In the present case, the prosecution was plowing new ground, not only did they introduce gruesome photographs (Ex. 21, 22 and 34) they played a video color tape (Ex. 39) of the crime scene portraying the body of the victim, from several angles, and the blood stained walls, sofa and floor. Addition-

ally, the video tape was played, not only for the jury, it was played again for the general audience. For what purpose we will never understand.

The photographs and video tape were cumulative evidence. The autopsy report had been stipulated to and the crime scene described in all its gruesome detail by four police investigators. We feel the court must draw the line someplace and the video color tape in this case went too far. Any probative value the video may have had was greatly outweighed by the nature of the area and body depicted and so inflamed the jury that appellant could not have had a fair trial

In essence, the state here simply used the photographs and the video tape to orchestrate an inflamed atmosphere of prejudice against this petitioner.

It must be remembered that the issue of voluntariness of the confessions was an issue for the jury. The only evidence the state had to attempt to link appellant to the crime scene was a "similar" palm print, and a "similar" hair. These items had been explained by appellant's constant visits to the Cook apartment. The state realized its evidence on the confessions was weak and, in all probability, that it had not met its burden of proving voluntariness. It, therefore, introduced the gruesome pictures and the equally gruesome video tape to inflame the jury and cement appellant's fate.

CONCLUSION

For the foregoing reasons we urge this Court to grant the writ prayed for.

KEVIN RIFE,
Petitioner,

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APPENDIX A
OPINION SUPREME COURT OF NEBRASKA

State v. Rife

No. 82-659 — filed August 5, 1983.

1. Confessions. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case.

2. Confessions: Appeal and Error. A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.

3. Venue: Appeal and Error. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown.

4. Juror Qualifications. The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to competency of the jurors.

5. Motions for Mistrial: Juror Qualifications. In the absence of a showing of prejudice, a trial court is correct in denying a motion for mistrial. Opportunity for prejudice or disqualification of jurors does not raise a presumption that prejudice

or disqualification exists.

6. Video Tapes. Admission of video tapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs.

7. Homicide: Photographs. In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.

8. _____ : _____ . A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid.

Krivosha, C.J., Boslaugh, McCown, White, Hastings, Caporale, and Shanahan, JJ.

WHITE, J.

This is an appeal from the District Court for Sarpy County, Nebraska, from a verdict of guilty to second degree murder and a sentence of 30 years. Appellant appeals and assigns that the trial court erred in (1) failing to sustain appellant's motion to suppress statements given by appellant to the Bellevue police; (2) failing to sustain appellant's motion for change of venue or continuance; (3) failing to grant a mistrial based upon jury misconduct during the trial; (4) failing to grant a mistrial based upon the introduction and viewing by the jury of a video tape of the murder scene; (5) allowing prejudicial and inflammatory photographs and testimony into evidence; and (6) failing to give appellant's requested instruction regarding *Miranda* warnings. We affirm. A statement of

the facts is necessary.

On Saturday night, January 23, 1982, Lori Lappin and two friends attended a party in Bellevue, Nebraska, arriving home at 1 a.m. Edel Cook remained behind at the apartment she shared with Lori and went to work at the Crown Court restaurant, which was also in Bellevue, on Sunday morning, January 24, 1982. Lori left the apartment with her boyfriend, Mark Hensley, that day at 1:30 p.m. and did not return until 8 p.m. Upon opening the door they discovered the body of Edel Cook on the sofa against the north wall in the living room. There was a large amount of blood on the face of Edel and the north wall of the apartment. Edel's body was covered with a quilt which left uncovered her feet at one end and from the shoulders up at the other end. Edel's face did not have normal symmetry and had the appearance of being crushed from a severe beating. There was a deep laceration extending across her throat, and a serrated steak knife was found on the floor near the sofa. Around Edel's body were pieces of a ceramic vase and mug which had been broken. These pieces were lying next to and underneath Edel's body and also on the floor in front of the couch and by the hallway on the south side of the couch.

The shorts that Edel had been wearing at the time of her death had been cut in two at the crotch area and her panties had been partially pulled down, with blood smeared in the area of her thighs. The Bellevue police were called.

The police could find no visible signs of forced entry or attempted forced entry into the building, and the lock on the apartment door was in good working order. In a kitchen drawer the plastic divider that contained knives was stained

with blood, as was one steak knife in the drawer. The bathroom sink and faucet were stained with blood.

During the ensuing police investigation, Kevin Isaac Rife, a friend of the deceased, was interviewed by Det. David Carlson of the Bellevue police at approximately 2:30 a.m. on Monday, January 25, 1982. The interview lasted 25 minutes and related to the fact that appellant worked with the victim at Crown Court and was living in the apartment building next door, and to the appellant's activities on the date of the homicide, Sunday, January 24, 1982. Appellant was not a suspect at the time the interview took place, and he told police that he was at his parents' home in Bellevue all day Sunday until 7 p.m.

On Wednesday, January 27, 1981, Detective Carlson and Officer Joseph Jeanette questioned appellant's parents, Mr. and Mrs. Carl Rife, in an attempt to verify appellant's whereabouts on the date of the murder. They ascertained that appellant had been at his parents' home until 3 p.m., when his mother dropped him off at his apartment.

At 9:15 a.m. on Thursday morning, January 28, 1982, Officer Jeanette and Det. Dick Warren went to appellant's apartment to discuss the discrepancy regarding appellant's whereabouts on Sunday, the day of the murder. The appellant stated that he was nervous and scared when police came over and he just told them that he was not at his apartment that day. The officers then read the appellant his rights per *Miranda*. The appellant consented to a search of his apartment, and the officers asked him if he would come to the police station at 1 p.m. so he could be fingerprinted and interviewed by Detective Carlson.

At approximately 1:15 p.m. on Thursday, January 28, 1982, the appellant met Detective Carlson at the Bellevue police station to be fingerprinted, which took roughly 20 minutes. Following the fingerprinting, Detective Carlson directed the appellant to an interview room, where he was again advised of his *Miranda* rights. Detective Carlson filled in the appellant's name, address, date of birth, highest grade of education, and that the interview was being conducted in connection with a homicide. The rights advisory form was handed to the appellant and he was asked to read the top portion that had been filled in. Detective Carlson testified that appellant appeared to read the top portion of the form and he then read to appellant each of his rights from a blank form and asked him to follow along on the filled-in form. Appellant was further directed to answer aloud after each question and mark his answer under each question in the space provided. The appellant acknowledged that he was aware of each of his rights and stated that he was willing to make a statement and waive the services of an attorney.

Detective Carlson confronted the appellant with several statements he had made that conflicted with information the Bellevue police had. The appellant was questioned for about 15 minutes. When asked, "Why are you telling all these lies?" the appellant responded, "Because I killed Edel." The questioning continued for 45 to 50 minutes to determine the details of the murder. The appellant stated he saw Edel's car outside and a light on in her apartment. He went in and Edel gave him some acid or speed, and he began to freak out. At this time Edel was on the couch and rolled over as if she were going to go to sleep. He became angry and hit Edel several times over the head with a vase, until it shattered. He then

picked up a larger vase, and as he struck her again the second vase also broke. The appellant stated that he realized what he had done and that if Edel lived he would be in big trouble. He went into the kitchen to get a knife, took the knife out of the top drawer in the kitchen, and went back to Edel and cut her throat twice from left to right. He then went into the bathroom to wash the blood from his hands.

Detective Carlson obtained a tape cassette recorder upon which the appellant and he repeated basically the same conversation. Appellant was again read his *Miranda* rights. The tape-recorded statement was concluded at approximately 3:25 p.m. The appellant was asked to make a written statement pertaining to the crime, and to sign it. The appellant agreed. The appellant was furnished a meal and was then questioned again at 9:30 p.m. to clear up inconsistencies about the drugs he had taken and whether or not he had sexually assaulted Edel. The appellant was again given the *Miranda* warnings. In the 9:30 p.m. confession, which was taped, the appellant stated that he had not taken any drugs and that he had cut Edel's shorts with the knife, after her throat had been cut, and placed his middle finger in her vagina. Appellant did not at any time request an attorney or that the questioning stop. The appellant was charged with first degree murder, subsequently convicted of second degree murder, and sentenced to 30 years of hard labor.

We will discuss the assignments in order.

"To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case." *State v. Hunsberger*, 211 Neb. 667, 669-70, 319 N.W.2d 757, 759 (1982); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. *State v. Thompson*, 198 Neb. 48, 251 N.W.2d 387 (1977).

The appellant argues that "Detective Carlson did not bother to read the Rights Advisory form to appellant. He felt appellant understood it because his eyes traveled over the paper." Brief for Appellant at 31. This contention is simply not borne out by the record. Appellant was verbally advised of his constitutional rights on at least four separate occasions. Both the testimony of the appellant and Detective Carlson concur that appellant was asked to read the top portion of the advisory form, which contained information personal to himself, and then was verbally advised of his constitutional rights and asked to acknowledge yes or no after each question.

The appellant also argues that because the police knew before they questioned him that he was 5 feet 2 inches tall, weighed 109 pounds, lost his hair due to a thyroid condition, was a follower and very timid, that these facts, coupled with a small, windowless interrogation room, rendered his confession involuntary under the totality of the circumstances. We do not agree. The trial court found that the appellant was at all times fully advised of his constitutional rights during questioning, and found that he freely and intelligently chose to waive those rights. Appellant's alleged requests to speak to

his parents could not be construed as a request for an attorney. The appellant did not sound intimidated during his two taped confessions, and, in fact, he went to great lengths to duplicate for Detective Carlson the surprised sound of the victim's voice when he first struck her about the head with the vase before she lost consciousness. There were no leading questions asked or promises or threats made to the appellant in return for his confession. The finding of the trial court is amply supported by the record. The question of whether the appellant's statements were voluntary was also submitted to the jury under full and complete instructions. The first assignment is without merit.

The appellant next alleges that the trial court erred in failing to grant his motion for a change of venue or continuance. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. *State v. Boyer*, 211 Neb. 139, 318 N.W.2d 60 (1982); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

An examination of the newspaper clippings and affidavit in support of the motion reveal no animosity or hostility directed toward the appellant. While the substance of the appellant's confession was discussed, the appellant made no effort to have the hearing closed, and the information that was disseminated was nothing more than that conventionally reported in news accounts of a trial, with the exception of one article. The Bellevue Leader published an extensive article in regard to the suppression hearing prior to its completion. The

July 7, 1982, article quotes extensively from direct interview comments made to the Bellevue Leader by Deputy Sarpy County Attorney John Irwin: "Irwin expressed his confidence in the confession obtained from Rife by these officers and the techniques used with the alleged murderer. 'They're good witnesses, good policemen and they follow good techniques . . . They did their job just fine. There's nothing you could find that they did wrong (in regard to obtaining a confession from Rife.)' "

The public comments by Mr. Irwin appear to constitute a serious violation of Canon 7, DR 7-107(B)(3) and (5), of the Code of Professional Responsibility, which provides: "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

. . . .

"3. The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

. . . .

"5. The identity, testimony, or credibility of a prospective witness."

However, the record shows that the trial court was thorough in its questioning in order to insure that none of the

veniremen had a preconceived notion of the appellant's guilt because of the media coverage, and no person was allowed to serve on the jury who was a subscriber to the Bellevue Leader, or who had read the article.

The appellant has failed to show that the jury was not impartial. Further, counsel accepted the jury without exhausting all of his peremptory challenges. Thus, counsel must have been satisfied that the jurors were fair and impartial. *The People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968); *State v. Lejeune*, 248 La. 682, 181 So. 2d 392 (1965), *cert. denied* 385 U.S. 845, 87 S. Ct. 37, 17 L. Ed. 2d 77 (1966).

In *Bufford v. State*, 148 Neb. 38, 42-43, 26 N.W.2d 383, 386 (1947), this court stated: "The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished there can be no just ground for complaint against the rulings of the court as to competency of the jurors."

The trial court did not abuse its discretion in denying a change of venue or a continuance. The motion for a continuance was attached to the motion for a change in venue, as an alternative remedy. We note from the record that appellant's motion for a continuance was more in the nature of a procedural step to preserve his right to complain of the pretrial publicity rather than a genuine desire to have the trial delayed to permit the advance effect of publicity to wane. We make this conclusion based upon the fact that appellant's counsel was satisfied with the court's ruling which took the combined motion under advisement until it could be determined whether an impartial jury could be selected. Once the

jury was impaneled, the appellant did not renew his motion for a continuance before the start of trial. Each time the motion was argued, the appellant's counsel stressed the need for a change in venue but did not discuss the need for a continuance. The second assignment is without merit.

During the trial one of the jurors indicated that she had watched a television report on Omaha channel 3. The appellant complains that the trial court erred in failing to grant his motion for mistrial based upon this alleged juror misconduct. There is no showing in the record of the content of the television report. One other juror during trial was found to have had the same employer as the appellant and the deceased. The juror stated to the court that she had worked there on the late shift, after the murder had occurred, as an auditor. The parties agreed to excusing her, and an alternate juror replaced her. In the absence of a showing of prejudice, the trial court was correct in denying the motion for mistrial. Opportunity for prejudice or disqualification of jurors does not raise a presumption that prejudice or disqualification exists. *State v. Beasley*, 183 Neb. 681, 163 N.W.2d 783 (1969).

The appellant next argues that the trial court erred in admitting color photographs of the deceased and a black and white video tape which showed the body as it was discovered at the crime scene. The basis for appellant's contention is that in addition to the relevancy of the exhibits being outweighed by their prejudice, the photographs and video tape were also unnecessarily cumulative because the autopsy report had been stipulated to.

Admission of video tapes is generally within the trial court's discretion, subject to the same requirements for ad-

mission of still photographs. *State v. Brooks*, 30 Wash. App. 280, 633 P.2d 1345 (1981).

Only four of the still photographs offered into evidence were pictures of the deceased and could be considered gruesome. Other photographs of the crime scene will not be discussed, due to the fact that counsel for the appellant also introduced a proof sheet or series of small photographs of the crime scene himself.

Two of the color photographs at issue show the head area of the body of Edel Cook as it was found shortly after police were summoned to her apartment. Detective Warren, who was the first person to the crime scene after the murder was reported, testified that both photographs accurately depicted the body as he saw it on January 24, 1982. The third photograph and duplicate slide were taken just prior to the autopsy of the deceased. The pathologist testified that the photograph and slide would be helpful in assisting him in explaining his findings to the jury. The slide was shown to the jury, but only the photograph was permitted to go to the jury room. As the jury viewed the slide the pathologist pointed out that the deceased had received several blows to the face resulting in multiple fractures of the top portion of the skull, with the brain exposed, fracture of the nasal bones, broken teeth, and severe hemorrhaging about the head. He concluded that Edel Cook was still alive from her head wounds but died as a result of a deeply penetrating laceration in her neck, which severed her windpipe, trachea, and jugular vein. He testified that his conclusion regarding the cause of death was based upon the fact that the neck wound was covered with a red, foamy material that occurs when the trachea is severed

and a person is still breathing. The last still photograph depicts the body of Edel Cook and is illustrative of the fact that she was sexually assaulted at the time of her death. The video tape showed the body as it was discovered at the crime scene.

In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. *State v. Jones,* 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979).

The appellant does not challenge the foundation laid for the video tape or photographs, and we are not persuaded that the relevance was outweighed by the prejudice they may have caused. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. *State v. Jones, supra; State v. Partee,* 199 Neb. 305, 258 N.W.2d 634 (1977).

Each of the photographs and the video tape that were admitted into evidence were relevant to prove the condition of the victim's body, the cause of death, intent and malice, and to corroborate the confession of the appellant that he was intimately familiar with the details of the murder.

The appellant stipulated that the body that was found was indeed Edel Cook and that the death certificate concerning Edel Cook could be introduced into evidence without further foundation. We have searched the record and are unable to find any stipulation to the cause of death in the autopsy, nor that the appellant had the requisite intent or malice

for the crime. Further, appellant does not cite this court to any such stipulation.

Under similar facts the Washington Court of Appeals held that the admission of five photographs and a video tape of a murder victim was not an abuse of discretion on the grounds that they were gruesome or that they were unnecessary because the defendant was willing to stipulate that the victim died of gunshot wounds. *State v. Tharp.* 27 Wash. App. 198, 616 P.2d 693 (1980), *aff'd* 96 Wash. 2d 591, 637 P.2d 961 (1981).

Further, we are unable to find anything in the record to show that the photographs or video tape were unnecessarily cumulative or admitted soley to influence the passions of the jury. There was no abuse of discretion.

Finally, the appellant urges this court to find reversible error by the trial court's failure to add to the NJI 14.52A to include "(e) That the interrogation may terminate at anytime he (the accused) may desire." Brief for Appellant at 40.

We held in *State v. Price,* 202 Neb. 308, 275 N.W.2d 82 (1979), that a court, even if requested, is not required to give NJI 14.52A. The appellant was given the benefit of submitting to the jury questions of law concerning the admissibility of a confession under *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). He will not be heard to complain that the court did not submit additional questions of law to the jury. The assignment is without merit.

The judgment is affirmed.

AFFIRMED.